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WELLS FARGO BANK, N.A., sued individually and
8 dba AMERICA'S SERVICING COMPANY, and
MORTGAGE ELECTRONIC REGISTRATION
9 SYSTEMS ("MERS")

10
11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
13

14 ALI SHAPOURI and LAURA AMANDA
SHAPOURI,

15 Plaintiffs,
16

17 v.

18 NDEX WEST, LLC, a Delaware Limited
Liability Corporation; WELLS FARGO
BANK, NATIONAL ASSOCIATION, dba
19 AMERICA'S SERVICING COMPANY;
MORTGAGE ELECTRONIC
20 REGISTRATION SYSTEMS, INC.,
a Delaware Corporation; and
21 DOES 1 through 100, inclusive,

22 Defendants.
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Case No. 3:11-cv-1699-W-MDD

**DEFENDANTS WELLS FARGO
BANK'S AND MERS' OPPOSITION
TO PLAINTIFFS' MOTION TO SET
ASIDE JUDGMENT**

Assigned to: Hon. Thomas J. Whelan

Date: September 10, 2012
Dept.: 7

Complaint Filed: June 30, 2011

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Fed. R. Civ. P. 60(b)2, 3, 8

1 Defendants Wells Fargo Bank, N.A., sued individually and dba America's
2 Servicing Company ("Wells Fargo"), and Mortgage Electronic Registration Systems
3 ("MERS" and, collectively, "Defendants") hereby submit their Opposition to Plaintiffs'
4 Motion to Set Aside Judgment pursuant to Fed. R. Civ. P. 60(b) ("Motion").

5 **I.**

6 **INTRODUCTION**

7 On July 23, 2012, this Court granted Defendants' motion to dismiss Plaintiffs' First
8 Amended Complaint ("FAC") because Plaintiffs' Cal. Civil Code §§ 1916.7, 1920, 1921
9 and negligent misrepresentation claims were time-barred and because Plaintiffs' rescission
10 and quiet title claims were undermined by state law, publicly-recorded documents, and
11 Plaintiffs' failure to tender. Because Plaintiffs could not amend to cure these defects, the
12 Court dismissed Plaintiffs' FAC with prejudice. *See* ECF No. 19. This was the second
13 motion to dismiss granted by the Court. *See* ECF No. 8. In its first dismissal order, the
14 Court emphasized the statute of limitations and tender problems (among others) and gave
15 Plaintiffs limited leave to amend to attempt to fix these defects. *Id.* Unfortunately for
16 Plaintiffs, they failed, as the problems were fatal and unfixable.

17 This Court also noted that Plaintiffs had not opposed Defendants' motion to
18 dismiss, and determined that Defendants' motion should be granted on that ground as well.
19 *See* ECF No. 19, p. 4:18-21 ("there is no evidence before the Court that Wells Fargo and
20 MERS' moving papers failed to reach the mailing address designated in their Proof of
21 Service (which also indicates that the Shapouris were electronically served with the
22 papers) ... the Court deems the Shapouris's failure to oppose Wells Fargo's and MERS'
23 motion to dismiss as consent to its merits.").

24 In their Motion, Plaintiffs seek to vacate the Court's judgment. Plaintiffs, however,
25 fail to detail how they would have successfully opposed Defendants' motion to dismiss,
26 nor have they proffered a proposed opposition. Plaintiffs also fail to offer any indication
27 as to how they would amend their FAC, if they were afforded leave to do so. Instead,
28 Plaintiffs simply argue the Court's judgment should be set aside because "Plaintiffs'

1 counsel never received [Defendants'] Motion to Dismiss and, therefore, did not prepare a
2 response to such." Motion, p. 5:13-15. Plaintiffs' Motion is an exercise in futility. No
3 amount of opposing, or amending, would make Plaintiffs' claims timely, create a tender
4 where none was made, change existing law or alter documents that have been publicly-
5 recorded.

6 Moreover, Plaintiffs' "excuse" for not responding to Defendants' motion to dismiss
7 is insufficient to overturn the Court's judgment. Plaintiffs simply failed to diligently
8 prosecute their action. Defendants' papers had been lodged with the Court's online docket
9 since January of this year, which Plaintiffs would have noticed if they had checked the
10 docket at any time in the last seven months. If Plaintiffs were diligently prosecuting their
11 action, and truly believed that Defendants had failed to respond to their FAC, they would
12 have sought a default.

13 Finally, Plaintiffs should have received notice of Defendants' motion to dismiss.
14 As the Court noted in its Order, there is no evidence that Defendants' moving papers failed
15 to reach the mailing address designated in the proof of service and on record with the
16 Court. Moreover, with electronic filing, Plaintiffs should have also received an electronic
17 version of the papers. Indeed, Plaintiffs used the same filing system (and the same email
18 address) to file and receive various pleadings throughout this litigation.

19 For each of these reasons, any one of which is sufficient, Plaintiffs' Motion should
20 be denied and the Court's judgment should stand.

21 II.

22 LEGAL STANDARD

23 "To establish mistake, inadvertence, or excusable neglect under Rule 60(b)(1), a
24 defaulting party must show that '(1) it had a meritorious defense that might have affected
25 the outcome; (2) granting the motion would not result in prejudice to the non-defaulting
26 party; and (3) a good reason existed for failing to reply to the complaint.'" *In re Worldwide*
27 *Web Sys.*, 328 F.3d 1291, 1295 (11th Cir. 2003); *see also Falk v. Allen*, 739 F.2d 461, 463
28

1 (9th Cir. 1984); *Brandt v. American Bankers Ins. Co. of Florida*, 653 F.3d 1108, 1111 (9th
2 Cir. 2011).

3 III.

4 PLAINTIFFS' MOTION IS FUTILE

5 In order to establish a meritorious defense, the moving party "must make an
6 affirmative showing of a defense that is likely to be successful." *In re Worldwide Web*
7 *Sys.*, 328 F.3d at 1296. In their Motion, Plaintiffs fail set forth a valid claim that would
8 have affected the outcome of this action. Nor can they. As noted above, this Court
9 properly granted Defendants' motion to dismiss for a number of reasons. Not only did
10 Plaintiffs fail to oppose Defendants' motion, which is grounds for granting the motion
11 pursuant to Civil Local Rule 7.1(f.3.c), but Plaintiffs' FAC was fatally defective and its
12 defects could not be cured by amendment. "[I]f a complaint is dismissed for failure to
13 state a claim upon which relief can be granted, leave to amend may be denied . . . if
14 amendment of the complaint would be futile." *Albrecht v. Lund*, 845 F.2d 193, 195 (9th
15 Cir. 1988); *see Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 767 (9th Cir. 1986)
16 ("The denial of plaintiff's motion for leave to amend was a proper exercise of discretion
17 because amendment would have been futile."). Because Plaintiffs could not cure the
18 defects in their FAC, allowing Plaintiffs to amend their action yet again would (i) be futile,
19 (ii) unfairly prejudice Defendants, and (iii) waste the limited resources of this Court.
20 Plaintiffs' Motion should be denied.

21 A. Plaintiffs' Claims are Time-Barred.

22 As the Court notes in its Order, Plaintiffs' claims for violation of Civil Code
23 Section 1916.7 and negligent misrepresentation are subject to a three-year statute of
24 limitations. *See* ECF No. 19, p. 5:6-9 (*citing Manantan v. National City Mortg.*, 2011 WL
25 3267706, at *3 (N.D. Cal. July 28, 2011); Cal. Civ. Code § 338). Because Plaintiffs' first,
26 second and fifth causes of action each relate to alleged violations and misrepresentations
27 that occurred at the time their loan closed in or about March 2005, and Plaintiffs did not
28 file their action until June 30, 2011, their claims are clearly time-barred.

Moreover, Plaintiffs failed to allege any facts that would support equitable tolling. Indeed, prior to filing their FAC, the Court warned Plaintiffs that such facts would be necessary for their claims to survive dismissal. *See* ECF No. 19, p. 5:11-20; ECF No. 8, p. 8:5-10. Plaintiffs either failed to heed this warning or, more likely, were simply unable to allege the facts necessary to invoke equitable tolling. Instead, Plaintiffs effectively conceded in their FAC that they should have been on notice of Defendants' alleged violations when they signed their loan documents in 2005. *See* ECF No. 19, p. 6:1-9.

Last December, the Court granted Plaintiffs an opportunity to amend their pleadings to demonstrate why their claims should not be dismissed as untimely. Plaintiffs failed to do so, and do not deserve another chance. No amount of amending can change the fact that Plaintiffs' claims relate to actions that occurred over seven years ago, well outside the applicable statute of limitations.

Plaintiffs have offered no facts, nor can they, to save their first, second and fifth causes of action. The Court's ruling was proper as to these claims and should not be vacated.

B. Plaintiffs' Claims are Untimely and Barred by California Law, the Existence of Publicly-Recorded Documents and Plaintiffs' Failure to Tender.

Not only have Plaintiffs proffered no support of their Civil Code and negligent misrepresentation claims, their third cause of action for rescission/cancellation and their fourth cause of action for quiet title are unsupported (and unsupportable) and were properly dismissed with prejudice.

In their FAC, Plaintiffs claimed they are entitled to rescission/cancellation and to quiet title because their consent was allegedly induced by fraud (and/or mistake) and because there was no recorded assignment of the loan and no recorded substitution of trustee. *See* FAC (ECF no. 9), ¶¶ 85-88, 95-96. Again, as demonstrated above, Plaintiffs' fraud claim is time-barred.

Furthermore, as the Court details in its Order, California law does not require the recording of an assignment of a beneficial interest in a loan before initiating non-judicial

1 foreclosure proceedings. *See* ECF No. 19, p. 6:16-18 (*citing Nguyen v. Calhoun*, 105 Cal.
2 App. 4th 428, 440 (2003)).

3 The Court also properly took judicial notice of publicly-recorded documents that
4 establish that an assignment and a substitution of trustee *were* recorded with the San Diego
5 County Recorder's Office. *See* ECF No. 19, p. 18-20; ECF No. 4-2, 4-3, p. 55, 57-58. In
6 fact, the Court properly took judicial notice of these documents prior to Plaintiffs filing
7 their FAC, yet they inexplicably maintained that such documents did not exist as a basis
8 for their claims.

9 Finally, even if Plaintiffs had a legal basis to seek rescission and to quiet title (they
10 do not), Plaintiffs' claims failed for lack of tender. *See* ECF No. 19, p. 6-7 (*citing Miller v.*
11 *Provost*, 26 Cal. App. 4th 1703, 1707 (1994); *Hamilton v. Bank of Blue Valley*, 746 F.
12 Supp. 2d 1160, 1177-78 (E.D. Cal. 2010); *Miller v. Wash. Mut. Bank, F.A.*, 776 F. Supp.
13 2d 1064, 1069 (N.D. Cal. 2011)). Once again, last December, the Court gave Plaintiffs an
14 opportunity to cure this pleading defect (ECF No. 8, p. 9:1-9), but it became clear they
15 could not. Accordingly, Plaintiffs are not entitled to rescission/cancellation and/or to quiet
16 title.

17 For each of these reasons, any one of which is sufficient, Plaintiffs' third and fourth
18 causes of action were properly dismissed with prejudice. Forcing Defendants to respond to
19 yet another pleading from Plaintiffs – pleadings that suffer from the same fundamental
20 deficiencies that cannot be remedied – would be prejudicial to Defendants and a waste of
21 both Defendants' and the Court's time and resources. Plaintiffs' Motion should be denied.

22 IV.

23 **PLAINTIFFS HAVE NOT DEMONSTRATED SUFFICIENT GROUNDS TO** 24 **VACATE THE COURT'S JUDGMENT**

25 The determination of what constitutes "excusable neglect" is an equitable one and
26 Plaintiffs must not only demonstrate a meritorious defense, but also that a "good reason"
27 existed for not opposing Defendants' motion to dismiss. *See In re Worldwide Web Sys.*,
28 328 F.3d at 1295; *Pioneer Inv. Svcs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 395

1 (1993) (the determination “is at bottom an equitable one, taking account of all relevant
2 circumstances surrounding the party's omission.”). Plaintiffs’ Motion is short on details
3 regarding how or why they did not receive notice of Defendants’ motion to dismiss. Even
4 if Plaintiffs’ claim is true (and evidence suggests otherwise), their excuse is insufficient to
5 vacate the Court’s judgment.

6 Plaintiffs’ failure to oppose Defendants’ motion to dismiss, after failing to check the
7 Court’s online docket for seven months, should not be considered excusable neglect. For
8 example, in *Stonkus v. City of Brockton Sch. Dept.*, 322 F.3d 97, 101 (1st Cir. 2003), the
9 court denied the movant’s request to belatedly oppose a motion for summary judgment
10 because “the stated reasons for the neglect — confusion over filing dates and busyness —
11 hold little water.” The *Stonkus* court explained, “[m]ost attorneys are busy most of the
12 time and they must organize their work so as to be able to meet the time requirements of
13 matters they are handling or suffer the consequences.” *Id.* (internal citations omitted).

14 Plaintiffs claim that the reason they failed to oppose Defendants’ motion to dismiss
15 is because they were “not aware that Defendants [] even filed a Motion to Dismiss.”
16 Motion, p. 6:13-14. Regardless of whether Defendants served their motion at the correct
17 address listed with the Court (they did), Defendants’ motion was docketed with the Court
18 since January 2012. Plaintiffs evidently failed to check the docket, even after filing their
19 opposition to co-defendant’s motion, for seven months. If Plaintiffs had been diligently
20 prosecuting their claims, it seems they would be interested in whether Defendants had
21 responded to their FAC. Yet Plaintiffs never sought to take Defendants’ default or even
22 inquire as to whether a response had been filed. Plaintiffs’ neglect was inexcusable and
23 Plaintiffs’ Motion must be denied.

24 **V.**

25 **PLAINTIFFS SHOULD HAVE RECEIVED NOTICE OF DEFENDANTS’**
26 **MOTION TO DISMISS**

27 Finally, the mailing address listed with the Court for service on the Plaintiffs is 402
28 West Broadway, Suite 1900, San Diego, CA 92101. That is the address to which

1 Defendants mailed their motion to dismiss. *See* ECF No. 10-2. Not only have Plaintiffs
2 maintained the same mailing address with the Court, they maintained the same email
3 address and Defendants received confirmation that Notice of Electronic Filing had been
4 sent to “veronica@vaguilarlaw.com.” *See* Exhibit A, attached hereto. In the words of the
5 *Stonkus* court, Plaintiffs’ excuse holds “little water.” The evidence before the Court
6 establishes that Plaintiffs should have received notice of Defendants’ motion to dismiss.
7 Their vague contentions to the contrary do not constitute “good cause” and Plaintiffs’
8 Motion should be denied.

9 **VI.**

10 **CONCLUSION**

11 Under the factors outlined by the Ninth Circuit, as well as by other circuits and the
12 United States Supreme Court, Plaintiffs do not merit relief under Rule 60(b)(1) for
13 “excusable neglect.” Plaintiffs have offered no showing that their claims are validly pled
14 or that the Court erred in granting Defendants’ motions to dismiss. Moreover, allowing
15 Plaintiffs to amend, and forcing Defendants to respond to yet another meritless pleading,
16 would prejudice Defendants and be a waste of this Court’s limited time and resources.
17 Finally, Plaintiffs’ purported excuse is undermined by the evidence before the Court. For
18 each of these reasons, any one of which is sufficient, the Court should deny Plaintiffs’
19 Motion. The judgment entered by the Court should stand.

20 Dated: August 27, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

21 By

/s/ Mark G. Rackers

EDWARD D. VOGEL

MARK G. RACKERS

22
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27 and MORTGAGE ELECTRONIC
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Case Name: Shapouri et al v. NDEX West LLC et al
Case Number: 3:11-cv-01699-W -MDD
Filer: Mortgage Electronic Registration Systems, Inc.
Wells Fargo Bank, National Association

Document Number: 10

Docket Text:

MOTION to Dismiss *Plaintiffs' First Amended Complaint for Failure to State a Claim [Fed. R. Civ. P. 12(b)(6)]* by Mortgage Electronic Registration Systems, Inc., Wells Fargo Bank, National Association. (Attachments: # (1) Memo of Points and Authorities, # (2) Proof of Service)(Rackers, Mark)

3:11-cv-01699-W -MDD Notice has been electronically mailed to:

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1 *Ali Shapouri, et al. v. NDEX West, LLC, et al.*, United States District Court for the
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2
3 **PROOF OF SERVICE**
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4 I am employed in the County of San Diego; I am over the age of eighteen years and
5 not a party to the within entitled action; my business address is 501 West Broadway, 19th
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6 On **August 27, 2012**, I served the following document(s) described as

7 **DEFENDANTS WELLS FARGO BANK'S AND MERS' OPPOSITION TO**
8 **PLAINTIFFS' MOTION TO SET ASIDE JUDGMENT**

9 **Electronic Mail Notice List**

10 **The following are those who are currently on the list to receive e-mail notices for this case.**

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16 ☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of
17 this Court at whose direction the service was made. I declare under penalty of
18 perjury under the laws of the United States of America that the foregoing is true and
correct. Executed on August 27, 2012, at San Diego, California.

19
20 
21 **PAMELA PARKER**